# ANSWERS

FOR

## Major ALLAN M^c^LEAN;

TO THE

## CONDESCENDENCE of Capt. ROBERT CAMPBELL, and Others.

IN the condeſcendence it is ſaid, that the declinature moved by Major *M'Lean* is without precedent, and that he was probably afraid to enter upon the merits of the cauſe; at the ſame time, in the very next paragraph, he is blamed for having argued the merits of the cauſe at great length, in his anſwers to the petition, and for having thrown out reflections againſt the purſuers, which they are pleaſed to denominate *unjuſt* and *unprovoked*.

Major *M'Lean* begs leave to anſwer, That the declinature muſt be without precedent, becauſe it is certain that the preſent action is the *firſt of the kind* that ever was brought before this court: and without ſtating the caſe fully, and even arguing on the merits of the cauſe, it was impoſſible to give your Lordſhips any juſt idea of the nature of the action, ſo as to enable you to judge whether it was proper or not to be tried in this court: and accordingly, both before the Lord Ordinary, and before your Lordſhips, the merits of the queſtion have been entered into, and diſcuſſed by both parties; and Major *M'Lean* has all along inſiſted, that from the whole circumſtances and complection of the caſe, it was neither competent nor proper to be tried in any court of law: ſo that the inſinuation of his being apprehenſive with regard to the merits, is groundleſs, and might have been ſpared.

22

As to any reflections againſt the purſuers, he can find none in his anſwers to the petition, other than an obſervation expreſſed in the following words: "The reſpondent is perſuaded, that nothing but their

" entire ignorance of the ſervice, and the *neceſſities* of ſome of them, " could have induced them to inſiſt in ſo calumnious a ſuit."—The reſpondent does ſtill adhere to the remark.—He has perſonally a great regard for all the purſuers, with whom he had the pleaſure to live in intimacy and friendſhip, while the regiment ſubſiſted; and he can impute their conduct in this affair, to nothing but the youth and inexperience of ſome of them, and the diſtreſſed circumſtances of one particular gentleman, who, by his miſmanagement when an officer in the *Dutch* ſervice, is now reduced to the greateſt difficulties.—Had the Major complained of them even in harſher terms, he thinks he might have been juſtified by certain particulars in their behaviour to him, which he begs leave to ſay were not altogether handſome.—He denies that he ever concealed or made a ſecret of the terms expreſſed in Mr *Townſhend*'s letter.—They were known to the whole regiment; and muſt, from the nature of the thing, have been known, as they contained an alternative to the Captains to raiſe their companies in one of two ways altogether different from each other; and ſome of the Captains choſe the one way, and ſome the other.—As ſoon as the preſent diſpute began, Major *M'Lean* delivered to Captain *Campbell* an authentic copy of Mr *Townſhend*'s letter, in order that he and the ſubalterns who joined him might found upon it in their memorial and complaint to be given in by them to the War-office.—When this memorial was lodged, the Major gave in his anſwers in writing: And he is ready to prove the fact, if denied, that the Secretary at war, upon conſidering the memorial and anſwers, did give a deliverance verbally, *as he always does*, ſignifying that there was no foundation for the claim, and that Major *M'Lean* had done his duty.—He will further prove, if denied, that at a meeting in *London* with Enſign *Barclay* one of theſe purſuers, in preſence of an honourable gentleman, now one of your Lordſhips number, the Major did inform Mr *Barclay* of the deliverance given by the Secretary at war, and did deſire and require him to go to the War-office for farther ſatisfaction as to that matter; and therefore it cannot but appear ſingular that the purſuers ſhould now deny that they know of any judgment given againſt them at the War-office.

It is alſo a moſt certain fact, which can be proved, that a ſecond memorial was lodged by them with Colonel *Leſlie*, in conſequence of his Majeſty's general order at reducing the regiment; that this ſecond memorial, along with Major *M'Lean*'s anſwer to it, was tranſmitted to the War-office by the commanding officer in Scotland; and

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that this ſecond application ended in the ſame manner with the firſt. The purſuers, however, chagrined at theſe repeated deciſions againſt them, were pleaſed to raiſe a moſt injurious clamour againſt the defender, aſſerting, in all companies, that he had tranſgreſſed his Majeſty's orders, and pocketed large ſums of money belonging to the regiment; and at laſt they brought the preſent action before your Lordſhips, concluding againſt him in very reproachful terms, as having been guilty of a downright fraud or embezzlement of the regimental funds; and what at once betrayed the ſpirit of the action, was an inhibition and an arreſtment moſt invidiouſly executed upon the dependence, whereby the whole of the reſpondent's funds in this country are attached and locked up.

The reſpondent thought it his duty, as an officer, to inſiſt that this queſtion could not be tried before your Lordſhips, in reſpect that it was entirely military, depending on the meaning of certain orders iſſued by his Majeſty at raiſing the regiment, and which orders could only be explained at the War-office, from whence they had iſſued, and where they had accordingly been explained, upon the application of theſe very purſuers. At the ſame time, the reſpondent, though he inſiſted in this preliminary defence, entered fully into the merits of the cauſe, and demonſtrated, in his humble apprehenſion, that a worſe founded claim was never brought before any court. It might have been expected that the purſuers, after having brought ſuch an action, would have done every thing in their power to forward it; but, on the contrary, it is a certain fact, that the reſpondent has been obliged to puſh them from ſtep to ſtep, inſomuch that during two years dependence before the Lord Ordinary, the cauſe was not above thrice by them inrolled.

The purſuers ſay, that their claim comes ſhortly to this: "They "aſſert that a large ſum of money was graciouſly beſtowed by his "Majeſty, and impreſſed into the Major's hands, for the ſole purpoſe "of levying this regiment: That this money was ordered to be ap-"plied for relief of the officers who ſtood in the ſituation of the pur-"ſuers, for whom the Major was only a receiver or truſtee: That the "Major, nevertheleſs, has refuſed to give them their ſhare and propor-"tion of it, and even to the contrary has made undue and heavy "exactions from them; and therefore he ſhould be decerned to pay "them that money which is already in his pocket, and which juſtly "belongs to them." This general aſſertion has no doubt the appearance of relevancy, and your Lordſhips would at firſt view be apt to imagine

imagine that it reſolves into a claim of debt cogniſable in this court. But when the grounds of this claim are a little more particularly inquired into and explained, it is, with ſubmiſſion, clear that the queſtion is of ſuch a nature that it cannot with any propriety be tried by your Lordſhips.

The purſuers have all along proceeded upon a fundamental miſtake, in ſaying that any money was impreſſed into Major *M'Lean*'s hands, or beſtowed by his Majeſty in ſuch a way as to give a *jus quæſitum* in that money to the purſuers, or to any other officer. What the reſpondent hereby means will be beſt underſtood by the following true and genuine ſtate of the fact.

Towards the end of the laſt war no leſs than twenty new battalions were raiſed at one and the ſame time, upon terms and under conditions preſcribed to the ſeveral commanders by Mr *Townſhend* then Secretary at war. The reſpondent had the honour of being appointed Major-commandant of one of theſe battalions; and in general it was underſtood, that the expence of ſuch new levies was to ly on the officers, in conſideration of the rank they were to obtain. The captains were either promoted from being officers of inferior rank in the *Britiſh* army, or they were appointed by the intereſt of their friends from the *Dutch* ſervice, or from no ſervice at all. With regard to the firſt claſs, *viz.* Thoſe who were already in the *Britiſh* ſervice, it was agreed that they ſhould have an alternative of either ſelling their former commiſſions, and contributing the money ariſing therefrom, as a fund which might anſwer in part for raiſing the companies in the new levies; in which caſe, the King was to appoint their ſubalterns in the new-raiſed regiment: or, if they inclined to leave their former commiſſions to be diſpoſed of by his Majeſty, they were then to be allowed to name their ſubalterns in the new-raiſed regiment; and in that caſe, they and the ſubalterns were to be at the expence of raiſing their companies, without being intitled to any dividend of the fund contributed by the other Captains. As to the gentlemen who were appointed Captains to the new levies from the *Dutch*, or from no ſervice at all, they could have no alternative, as they had no former commiſſions to be diſpoſed of, and conſequently no fund to contribute, for levying the new regiment. The Captains therefore, who were in this ſituation, were to raiſe their own companies; and in order to enable them ſo to do, they procured leave to appoint their ſubaltern officers, whoſe commiſſions they might either diſpoſe of for money, or for a certain

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number of men.—But it was never dreamed that they were likewiſe to have a dividend of the levy-money contributed by thoſe officers who ſold their former commiſſions as above mentioned.

This diſtinction is in part admitted in the condeſcendence, though the purſuers were pleaſed formerly to diſpute it. They allow that the officers already in the *Britiſh* ſervice, were to have an option to follow one or other of the two methods above laid down; but they ſeem to inſinuate, that the gentlemen who had no former commiſſions to diſpoſe of, and conſequently had it not in their power to contribute to the fund of the regiment, might nevertheleſs be intitled to levy-money out of that fund. No doubt it was in the power of the King to have given an order for that purpoſe; but without ſome ſuch order, or ſpecial direction, your Lordſhips will not eaſily preſume that it could be the intention of his Majeſty to put thoſe gentlemen who were appointed *per ſaltum* from the *Dutch*, or from no ſervice, upon a footing ſo much better than the officers who had already commiſſions in his own army.

The ſeveral Commandants having been named, and the Captains alſo ſettled, a paper of inſtructions, in the form of a letter, ſubſcribed by Mr *Townſhend*, was iſſued from the War-office, expreſſing very conciſely the general conditions under which theſe battalions were to be raiſed. The letter received by the reſpondent was in theſe words: "*War-office*, 26th *October* 1761. Sir, I have the honour to "acquaint you, that the King has been pleaſed to approve of your "propoſals for raiſing a corps of ſix companies, according to the "preſent eſtabliſhment of the regiments of foot in *Great Britain*, "under your command as Major, upon the following conditions.

"1*mo*, The propoſed Major and Captains to ſell their preſent com-"miſſions.

"2*do*, The Captain-lieutenancy to be ſold.

"3*tio*, The money ariſing from the ſale of theſe commiſſions to "be thrown into a fund; no other levy-money to be allowed, nor "pay but from the date of atteſtations of the recruits.

"4*to*, The corps to be completed within five months.

"5*to*, The officers to take rank from the date of the beating-or-"der, provided the corps ſhall be compleat and approved, upon a "review, within the time preſcribed.

"6*to*, Any Captain who is to raiſe his own company, may ap-"point his ſubalterns; but in that caſe, he muſt not ſell his own "commiſſion, but may thoſe of his ſubalterns.



"7*mo*, The

" *7mo*, The preſent commiſſions of the Major and Captains which " are to be ſold upon this plan, muſt be firſt offered to the officers " of the corps in which the ſaid commiſſions are to be ſold, upon " the uſual terms. If they decline the purchaſe, or if the regiment " is abroad, an officer of another regiment may be admitted to pur- " chaſe, with the conſent of the Colonel.

" *8vo*, The Lieutenancies and Enſigncies are not to be ſold in " thoſe companies where the Captain has ſold his commiſſion.

" *9no*, The whole expence of completing the corps, beyond the " ſum ariſing from the ſale of the commiſſions above mentioned, to " be defrayed by the Major and Captains, in conſideration of the " rank they are to gain.

" I ſend you, incloſed, a liſt of the propoſed Captains, who are to " aſſiſt you in raiſing the battalion: a liſt of the ſubalterns ſhall be " ſent as ſoon as they have been approved of by the King.

" His Majeſty expects that the battalion ſhall be compleat within " five months from the date of the beating-order, according to your " propoſal: and, in caſe of any failure of you *or the propoſed Cap-* " *tains and officers* in fulfilling your engagements, his Majeſty will " look upon your reſpective pretenſions to rank as forfeited. I am,

Sir, Your moſt humble ſervant,

(Signed) CHARLES TOWNSHEND."

" *Liſt of Captains propoſed for Major* M'Lean's *Corps.*

" The Hon. *William Boyd*, — of *Keith*'s.
" *James Stewart*, — — *Crawford*'s.
" *John Forbes*, — — — 12th Regiment.
" *James Gordon*, Gentleman."

The inſtructions contained in the above nine articles were identically the ſame with thoſe which were tranſmitted to each of the other Commandants of the twenty battalions; ſo that the general terms and conditions upon which they were to be levied were underſtood to be the ſame; though each battalion was unavoidably attended with circumſtances peculiar to itſelf, which occaſioned many variations and exceptions from the general rules. Theſe were afterwards explained and adjuſted between the Secretary at war and the officers in command: and even the general regulations laid down in the letter of inſtructions were ſo abruply expreſſed, that many verbal explanations

planations at the War-office were afterwards neceſſary. In the beginning of the letter there is a reference to certain propoſals ſaid to have been given in by the reſpondent: but the fact is, that he gave in no propoſals; and though he had, it would not be material to the preſent queſtion.—Articles firſt and third, taken by themſelves, would ſeem to mean, that the whole Captains were, by the ſale of their former commiſſions, to contribute towards the fund of the regiment; and that this fund was to be applied towards raiſing all the companies. At the ſame time, it is clear from the other articles, that this fund was not conſidered as a general fund for the regiment, but that certain Captains were to raiſe their companies at their own expence; and indeed it is now admitted by the purſuers themſelves, that there was a diſtinction. They indeed endeavour to confine this diſtinction to officers already in the *Britiſh* army, but there is no ground for ſuch limitation; his Majeſty's meaning plainly was, that thoſe Captains, who either did not, or could not contribute to the fund of the regiment by the ſale of former commiſſions, were to raiſe their men entirely at their own expence, and were in ſo far to be conſidered as raiſing independent companies.

Two of the Captains appointed to the reſpondent's battalion were Captain *Stewart*, who then had a lieutenancy in the *Britiſh* army, and Capt. *Campbell*, who was a lieutenant in the *Dutch*. Capt. *Stewart* had been recommended to this company by Lord *Gairlies*; and it appears by letters in proceſs which paſſed between Lord *Gairlies* and the reſpondent, that Capt. *Stewart* choſe the alternative of raiſing his own company, upon being allowed to appoint his ſubalterns; and his former commiſſion was accordingly diſpoſed of by the King, without being ſold for behoof of the battalion. Capt. *Campbell*, who had been brought from the *Dutch* ſervice by the intereſt of Lord *Breadalbane*, had no alternative; he contributed nothing to the fund of the regiment, and he was therefore under a neceſſity of raiſing his company with the aſſiſtance of the ſubalterns to be appointed by him, or by his friend Lord *Breadalbane*.

That this was ſufficiently underſtood by all parties at the time, appears from the following documents in proceſs.—Of this date, the reſpondent received a letter from Mr *Bradſhaw* firſt clerk of the War-office, in the following words: Sir, I am directed by the Secretary at " war, in the abſence of his deputy, to deſire, that you will acquaint " me as ſoon as poſſible, for his information, how many of the pro- " poſed captains for the corps under your command, chuſe to raiſe " their Oct. 25. 1761.

" their own companies, upon being allowed to recommend their " ſubalterns."

To which the reſpondent made anſwer as follows. *Cravenſtreet*, 26th *October* 1761. " Sir, I am favoured with yours, of yeſterday's " date; in anſwer to which, you will acquaint the Secretary at war, " that there are but two Captains of the battalion under my com- " mand, who will raiſe their companies, and appoint their ſubalterns: " the one is Capt. *James Stewart*, who appoints his ſubalterns, and " leaves to his Majeſty to fill up his commiſſion; the other is Capt. " *Robert Campbell*, who has no alternative, having no commiſſion to " ſell, or throw up."

There are alſo two letters in proceſs, from *James Goldfrap* agent of the regiment, in which the diſtinction is clearly laid down.—The reſpondent had allowed the whole officers to draw money out of the agent's hands, during the recruiting, in order that the regiment might be expeditiouſly raiſed, but which they were to account for afterward.——Mr *Goldfrap* agreed to anſwer their drafts; and of this

Nov. 2. 1761. date, wrote to the reſpondent as follows: " I wrote to Meſſ. *Mans-* " *field*, *Hunter*, and Co. that they were to ſupply your officers " with money, during the recruiting the regiment; and that they " were to draw upon me, at the end of every two months, for what " they had diſburſed: and as this method ſeems well calculated for " the accommodation of the ſervice, things muſt go ſmoothly, provided " they keep every officer's diſtinct account, *ſpecifying the Captains and* " *ſubalterns who are to raiſe their own companies*, that I may know, " when the recruiting is over, what I am to charge each officer with, " reſpectively. The bills may be drawn upon me, to be placed to " the recruiting account of the regiment, without any other diſtinc- " tion, *&c.*"

Dec. 19. 1761. And, in a ſubſequent letter, of this date, to Mr *M'Lean* of *Torloiſk*, the reſpondent's brother, now deceaſed, Mr *Goldfrap* writes; " I hope " the Major has lately ſeen Meſſ. *Manſfield*, *Hunter* and Co. and fixed " ſome limits to their drawing bills upon me, as they have extended " this article further than I underſtood by your brother they were to " do, and about which I wrote to him, the poſt before the laſt. *I think* " *two of the Captains in the Royal volunteers were to raiſe their compa-* " *nies independent of the Commandant.*"

It is clear therefore, that Capt. *Campbell* and Capt. *Stewart*, and their ſubalterns, were underſtood to be on a different footing from the other officers; and particularly as to Capt. *Campbell*, it would have been

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moſt unjuſt, to have admitted him to a ſhare of the fund to which he contributed nothing.—Several other gentlemen who came from the *Dutch* ſervice, and were preciſely in the ſame ſituation with Capt. *Campbell*, were appointed Captains in the new levies: and not a ſingle inſtance can be given of any of them having received a farthing of the regimental funds, excepting one or two who were in Col. *Græme*'s regiment; but which cannot be reckoned an exception, as Col. *Græme*, who had the abſolute direction of every thing relating to his regiment, preſcribed various rules for his officers, which did not obtain in the other battalions; and particularly, for reaſons which need not here be explained; brought in thoſe who had come from the *Dutch* ſervice, for an equal ſhare of the regimental fund with the other officers who had contributed to that fund.—No ſuch thing was done in any of the other regiments, as can be proved, if neceſſary; for example, Capt. *Charles Stewart* from the *Dutch* ſervice, who was appointed a Captain in Major *Crawfurd*'s battalion, got no part of the regimental fund.—Capt. *Gordon* of the ſame battalion, who had been in no ſervice, was in the ſame caſe; and a variety of other inſtances might be mentioned.

The Captains appointed to the reſpondent's battalion were, the hon. Captain *Boyd*, who was allowed to ſell a company which he already had in *Keith*'s, at *L.* 1050; *James Stewart*, formerly a Lieutenant in *Crawfurd*'s, who left his commiſſion to be diſpoſed of by the King; *John Forbes* from the 12th regiment, who ſold his former lieutenantcy at *L.* 400; Mr *Sutherland* from the 34th regiment, whoſe lieutenancy was alſo valued at *L.* 400; Captain *Campbell* from the *Dutch*, who had no former commiſſion to diſpoſe of. Captains *Stewart* and *Campbell* were therefore, with the aſſiſtance of their ſubalterns, to raiſe their own companies; and the fund out of which it was expected the other four companies were to be recruited, was as follows.

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| The reſpondent's former commiſſion, as Captain of an independent company in *America*, ſold at | *L.* 1250. |
| Capt. *Boyd*'s company in *Keith*'s, — — | 1050. |
| Capt. *Sutherland*'s former lieutenancy, valued at | 400. |
| Capt. *Forbes*'s, ditto — — — | 400. |
| The Captain-lieutenancy of the new battalion, ſold at | 600. |
| Fund expected to have been divided, — | *L.* 3700. |

But in reality the fund turned out to be under *L.* 1900. For, in the *firſt* place, His Majeſty, by his ſpecial order ſignified from the War-office, cauſed *L.* 550 to be repaid to Capt. *Boyd*, for his own perſonal uſe. *2dly*, Capt. *Sutherland*'s lieutenancy yielded not more than *L.* 150; the fact being, that it was diſpoſed of to an enſign in the ſame regiment, who paid only *L.* 150, as the difference between the two commiſſions, and the enſigney was filled up by his Majeſty without any ſale, by which *L.* 250 of the value of Capt. *Sutherland*'s commiſſion was loſt to the battalion. *3dly*, It appears from Mr *Goldfrap*'s accounts now produced, that the intereſt and diſcount on money advanced by him for raiſing the regiment, amounted to *L.* 350, beſides fees at different offices, to the amount of *L.* 34, 9 *s.* *4thly*, The extraordinary præmiums charged by him on bills drawn by *Manſfield*, *Hunter*, and Co. was upwards of *L.* 100. *5thly*, Poſtages, expreſſes, and other neceſſary charges, came to above *L.* 100. *Laſtly*, When the reſpondent diſpoſed of his company in *North-America*, there were forty deficient men who had been killed and wounded in the courſe of the then campaign, ſo that he was obliged to give an allowance to the purchaſer of ſaid company, of no leſs than *L.* 250, as the expence of recruiting of theſe men.—All theſe ſums being deduced from the fund expected to have been raiſed, your Lordſhips will obſerve, that in place of *L.* 3700, there was really little more than *L.* 1800. to be diſtributed among the officers of the four companies; and, in fact, it was every farthing diſtributed among them, at the rate of *L.* 5. 10 *s.* *per* man, to each Captain, and *L.* 3. 3 *s.* to each ſubaltern.

The purſuers are intirely in a miſtake, in ſuppoſing that the reſpondent had the touching of this money, or that it was diſtributed according to his will and pleaſure. In the *firſt* place, Your Lordſhips will be informed that not a ſingle farthing of it was raiſed except the *L.* 600 for the Captain-leiutenancy, till the battalion was compleatly eſtabliſhed, becauſe till then the officers had no power of ſelling their former commiſſions. The reſpondent was obliged to interpoſe his credit in the mean time, for raiſing the money neceſſary to recruit the regiment, which Mr *Goldfrap*, out of perſonal friendſhip to him, agreed to advance. This appears from another paſſage of Mr *Goldfrap*'s letter, dated 2d *November* 1761, in the following words: "Meſſ. *Manſfield*, *Hunter* and Company, will give me the earlieſt advice of the ſums they draw for, that I may be prepared to pay their drafts; which will be a very nice point, if you conſider that I have only the *L.* 600 for the Captain-lieutenancy in my hands,

" hands, and have not the leaſt proſpect of getting a ſhilling till the " regiment is compleat, and am therefore obliged to ſell *L.* 5000 of " ſtock at a very large diſcount: but, happen what will, you muſt " not fail for want of money."

*Secondly*, Even after the corps was compleated, the old commiſſions ſold, and the diviſions of the levy-money came to be made; this was not done ſolely by the reſpondent, or according to his will and pleaſure: the money was in the hands of Mr *Goldfrap* the agent of the regiment, and each officer of the four companies drew his ſhare at the rate of *L.* 5, 10 *s. per* man for the Captains, and *L.* 3, 3 *s. per* man to the ſubalterns, which was fixed on as an equitable proportion; and the reſpondent never touched a penny of the money further than his own ſhare, which was much more than expended in recruiting. The money remained indeed entirely at the diſpoſal of his Majeſty, and no officer could be properly ſaid to have any right in it, further than his Majeſty was pleaſed to direct; it was never impreſſed into the reſpondent's hands; and even after it was recovered by the agent for the regiment, a conſiderable part was applied to other purpoſes, in conſequence of an order from the King, which ſhows plainly, that the letter of inſtructions imported no actual transfer of this money to the officers, but, on the contrary, that the whole remained under the direction and diſpoſal of the King; otherwiſe it muſt be allowed, that the reſpondent and the other officers have a good claim againſt the government for repetition of the *L.* 550 ordered to be paid to Capt. *Boyd*, and the *L.* 250, which, as a part of the price of Capt. *Sutherland*'s former commiſſion, ought to have been paid into the regimental fund, but by the act and deed of his Majeſty was prevented.

It is ſaid that the reſpondent, without paying any regard to Mr *Townſhend*'s letter, was pleaſed to iſſue recruiting inſtructions by his own private authority, which were conceived in terms unwarranted by the King's orders, and even directly oppoſite to them, particularly in this, that they tended to throw a ſhare of the expence as well upon the ſubalterns, as upon the Captains, without reſerving either to them or the Captains any part of the fund deſtined for their relief: and they take hold chiefly of that part of the inſtructions where it is ſaid, that the officer ſhall be at the expence of levy-money, and that he ſhall pay ten guineas for every deficient man, though they are expreſsly diſcharged to beat up for more than nine guineas a man.

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This obſervation, with regard to the inſtructions, is likewiſe founded on a miſtake; they were not made out or iſſued by the reſpondent's ſole authority, but they were ſettled and compoſed at the War-office, and from thence iſſued, as appears from evidence in proceſs. ——The reſpondent, the very day after receiving the Secretary at war's letter, attended at the Office, in order to have his recruiting inſtructions made out, and ſundry particulars adjuſted, which had not been expreſſed or aſcertained in the letter; ſuch as, the quotas of the reſpective officers in recruiting, the number and eſtabliſhment of each company, the ſum to be paid for deficiency, the ſize and age of the men to be inliſted, *&c.* And accordingly, after ſettling theſe matters with the Secretary, the recruiting inſtructions engroſſed in the condeſcendence were formed by his clerks, reviſed by Mr *Townſhend*, recorded in the Office, and iſſued in common form, the fees being paid by the agent of the regiment, as appears from his account in proceſs. In theſe circumſtances the reſpondent cannot be anſwerable in any court in *Britain* for the particulars therein contained. Inſtructions in the ſame form were iſſued for all the twenty battalions, except Colonel *Graeme's*, who, in ſeveral particulars, followed a different method from the other Commandants; but upon looking into his recruiting inſtructions, which are hereto annexed, it appears that they are equally contradictory to the King's letter, and they begin in the ſelf-ſame manner with thoſe of the reſpondent's battalion, ordering the whole officers to be at the expence of levy-money; the meaning of which was no other than this, that the levy-money was, in the mean time, to be advanced by the officers, though they were afterwards to be refunded *pro tanto*, by the ſales of their former commiſſions.

The letter from the Secretary at war, containing the original inſtructions, was not intended to aſcertain a perfect plan, or to afford rules for the adjuſtment of every particular circumſtance that might attend an undertaking of this kind, the terms of which were entirely new, and left in a great meaſure to be regulated by Mr *Townſhend*. Thus, at firſt ſight, it might appear, from the conception of *article* 9th, that the ſubalterns appointed by the King were not to have any concern in levying the regiment, and that the Captains were to be at the ſole expence; yet there is no doubt that his Majeſty's general meaning was, to preſerve an equality among all the gentlemen concerned with as much preciſion as the nature of the thing could admit. There was even more reaſon for laying the ſurplus expence on

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the ſubalterns than on the Captains, as a Lieutenancy for the firſt ſtep is a higher promotion than a company from a Lieutenancy. And, upon the other ſuppoſition, a very great abſurdity would follow; for if the regiment was not compleated within the time preſcribed, the ſubalterns as well as the Captains were to forfeit their commiſſions, which, as they had no concern with levying the regiment, was altogether unjuſt. But that his Majeſty's intention was to lay a ſhare of the expence on the whole, is evident from the recruiting inſtructions iſſued from the War-office, to every one of the twenty battalions, from the conduct of the officers in all theſe battalions without exception, and even from the original letter of inſtructions to all of them, which bear, that in caſe of any failure in the Commandant, or the propoſed Captains *and officers*, in fulfilling their engagements, his Majeſty would look on their *reſpective pretenſions to rank as forfeited*; which evidently ſhows that the promotion of each individual depended principally upon himſelf, and that all of them, none excepted, were under engagement for that purpoſe.

As to the exaction of ten guineas for each deficient man at the review, this was a meaſure followed in every one of the twenty battalions, and was indeed abſolutely neceſſary to inſure the raiſing of the men. Ten guineas was the ſum allowed by the public for each man inliſted by any officer, who either could not provide his whole quota, and thereby forfeited his commiſſion, or who raiſed more than his proportion. It is a miſtake to ſay, that the reſpondent, by ſupplying the deficient men, and taking ten guineas for each, made any undue profit. The fact is, that had not the reſpondent and Captains *Forbes* and *Sutherland* brought a great number of ſupernumerary men into the field, whereby the deficients were ſupplied, the whole corps would have forfeited their commiſſions. The expence of raiſing theſe ſupernumerary men was not leſs than ten guineas at a medium; as in fact, though it was thought neceſſary to make a reſtriction in the recruiting order, as a reſtraint on young officers, apt to be extravagant in their recruiting, yet many of the men coſt much more than the high ſum to which the beating order limited. Beſides, your Lordſhips will obſerve, that the reſpondent was in no better caſe than the other officers as to this matter, for every officer in the regiment who raiſed more men than his quota, was intitled to receive ten guineas for each man; and, on the other hand, any officer who raiſed leſs was obliged to pay ten guineas for each deficient. The reſpondent was not the only

officer who raiſed ſupernumeraries; Capt. *Forbes* brought no leſs than 45 men more than his complement, for which he received *L.* 467, 10*s.* and Lieut. *Gray*, one of theſe very purſuers, received *L.* 21. for two ſupernumeraries inliſted by him. In fact, the reſpondent was the only officer who ſuffered by his ſupernumerary men, and indeed he ſuffered by them very eſſentially; for your Lordſhips will be informed, that after the regiment was compleat, and all the deficient men ſupplied, there remained no leſs than 105 ſupernumerary men upon his hands, who had been raiſed upon his proper expence. Theſe were drafted from him, and ſent to Germany to ſupply other regiments, and yet he never received a farthing of levy-money on that account, though repeated applications were made at the War-office as appears from a copy of one of his memorials in proceſs; by this means it happened, that, beſides contributing the price of his former commiſſion, the reſpondent was about *L.* 1100 or *L.* 1200 out of pocket when the battalion was compleated. This obliged him to apply for leave to ſell his company in the battalion; and having accordingly ſold it for *L.* 1100, he became thereby nearly indemnified as to his extraordinary expence; but the conſequence was, that while the regiment ſtood his pay ſuffered a reduction from 15 ſhillings to 5 s. per day, and all that he now has, is the ſimple half-pay of a Major, *i. e.* 2 s. 6 d. *per* day.

As to the non-effective men, it is very true that in the recruiting inſtructions, as well for this as for all the other battalions, it was ſaid that four ſuch in each company were to be allowed. It is well known, however, to every officer of theſe battalions, that each company was obliged to produce 100 men compleat at the review, beſides ſerjeants, corporals and drums, in all 110; and this continued to be the caſe till after the regiments were eſtabliſhed, from which time three non-effectives were allowed to each Captain.

Capt. *Campbell* ſays, that he never undertook to raiſe his company; and that, in fact, he had not the nomination of his three ſubalterns: and the other purſuers ſay, that they were appointed by the King, and did not bargain for their commiſſions with any of the Captains; and that ſome of them belonged, not to Capt. *Stewart* or Capt. *Campbell*'s companies, but to the other companies whoſe ſubalterns were intitled to a dividend. But, with ſubmiſſion, this is not quite a fair ſtate of the caſe.

It is inſtructed by a letter from Lord *Gairlies* to the reſpondent in proceſs, that Capt. *Stewart* agreed to raiſe his own company, without having

having any thing to do with the regimental fund; and that the reſpondent undertook to find him three ſubalterns, who would aſſiſt him by raiſing their *quotas* of men at their own expence. Accordingly the firſt lieutenancy of that company was diſpoſed of to the Honourable Lieutenant *Andrew Gray*, one of the purſuers; the ſecond, to *Lewis Innes*, another of the purſuers; and the enſigncy, to *Peter Gordon*, all of them recommended to the reſpondent by Lord *Adam Gordon*, and accepted of under the expreſs condition that the two Lieutenants ſhould furniſh twenty-four men each, and the Enſign eighteen at the review, upon their own proper expence. It was in this way that the two purſuers Lieut. *Gray* and Lieut. *Innes* were nominated, as can be proved by Lord *Adam Gordon:* they were appointed by Capt. *Stewart*, or, which was the ſame thing, by the reſpondent, at his deſire, and only approved of by the King; and therefore they can have no pretence to any of the regimental fund.

The purſuer Capt. *Campbell*, and two of his ſubalterns, who appear in this proceſs, *viz.* Lieut. *Robert Campbell*, and Enſign *Barclay*, are equally ill founded in their claim; and indeed ſome of them have diſcovered rather leſs gratitude than they ought to have done for favours received. Capt. *Campbell* was appointed *per ſaltum* from the *Dutch* ſervice, and could only be admitted on the footing of raiſing his company. He was originally recommended by the Earl of *Breadalbane*; but that nobleman underſtanding that a ſecurity at the War-office was neceſſary, and not chuſing to interfere, it is probable that Capt. *Campbell* would have been entirely ſtruck off, had not the reſpondent, from old acquaintance and friendſhip, interpoſed, and engaged for him at the War-office. This appears from a letter produced by the purſuers, and founded on in the condeſcendence, written of this date, by Major *M'Lean* then in *London*, to Capt. *Campbell* in *Edinburgh*. The purſuers have referred only to the poſtſcript; but the reſpondent, ſince his letter is founded on, will beg leave to give it verbatim: " Dr Robert, I am hopeful you will exert yourſelf in " recruiting your company. I adviſed you long ago to marry the " widow; do it now, and you'll ſecure Sir *William Stirling*'s intereſt, " who otherwiſe will be for Colonel *Græme*. I have often been in- " quiring for your chief, but he is not to be found, I mean Lord *Bread-* " *albane*; he indeed once recommended you, but you would have been " laid aſide, by GOD, had not Mr *Townſhend* mentioned your name " to me. Mr *Townſhend* told me he was credibly informed my Lord " *Breadalbane* could not make twenty men. I told him I did not " care 31ſt Feb. 1761.

" care whether he could or not, that I knew you, and would engage
" for you; ſo that you muſt exert yourſelf: try your friend *Carquhin*,
" and every one can ſerve you. Our regimentals are very handſome,
" truly royal. I will ſet out from here the 4th, and will endeavour
" to be at *Edinburgh* the 9th or 10th, where I would be glad to meet
" you: buſineſs would require it. The reſt of our chaps are young-
" ſters, ſo I'll ſtand in need of you on my arrival at *Edinburgh* for
" two days. I ſhall trouble you no further at preſent, but believe
" me your ſincere friend. (Signed) ALLAN M'LEAN.

" Be at *Edinburgh* the 10th of *November*, by all means. Your ſub-
" alterns will be ſettled in two days. I hope they will be Highlanders;
" and tho' they are to be appointed by the King, I have got a promiſe
" they ſhall be Highlanders. You muſt be at *Edinburgh* on the 10th
" *November*; and try if you can employ ſome body there to recruit
" for you: a metropolis is always a good place."

The poſtſcript of this letter is mentioned in the condeſcendence, to ſhow that Capt. *Campbell* had not the appointment of his ſubalterns; but it is an undoubted fact, that they were named either by him, or, which was the ſame thing, by his friend Lord *Breadalbane*, and the reſpondent had only entered a caveat that they ſhould be Highlanders. The letter to Capt. *Campbell* was written by him in a hurry, when he was preparing to ſet out for *Scotland*; and the poſtſcript is perhaps inaccurately expreſſed, as, in place of *appointed*, he ſhould have ſaid *approved of* by the King, the term actually uſed in Mr *Townſhend's* letter: and this matter might have been more fully explained, had the purſuers produced the letter from Lord *Breadalbane*, mentioned in their condeſcendence. By various accidents it happened that two of the original nominations by this nobleman did not take place; upon which Capt. *Campbell* applied to the reſpondent, and told him he was at a loſs for ſubalterns, who could produce the neceſſary *quotas* to make up his company. The reſpondent undertook to find two ſuch gentlemen immediately; and accordingly he agreed with *John Grant* for one of the lieutenancies, who became bound to produce twenty-four men upon his own expence at the review. The enſigncy was diſpoſed of to the purſuer *William Barclay*, for whom one of his friends engaged that he ſhould furniſh eighteen men at the review. The other Lieutenant was *Robert Campbell*, one of the purſuers, who had been named by Capt. *Campbell* or Lord *Breadalbane*, and with whom a bargain either was made, or ought to have been made, to produce his *quota* likewiſe.

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That ſuch was the way and manner in which Capt. *Campbell's* ſubalterns were appointed, the reſpondent offered before the Lord Ordinary, in caſe the competency ſhould be ſuſtained, to refer to Capt. *Campbell's* oath. And indeed he does not to this day pretend to deny it; but whether he does or not, it is a certain fact that he received the full benefit of ſixty men, furniſhed by theſe three ſubalterns, without any expence to him, and that his company coſt him no more than the price of levying forty-four men.

The reſpondent and Captains *Boyd*, *Sutherland* and *Forbes* were not only at the expence of levying their forty-four men each, but alſo had to pay the greateſt part of the ſurplus charge incurred by their ſubalterns, after deducing their ſhares of levy-money, and they were likewiſe at the whole expence of advance of money and other articles ſtated to their debit by the agent, for all which they were but in part indemnified by the ſhare of the levy-money allowed them.

The purſuers have given a ſcheme of what they ſay was paid to each officer out of the fund of the regiment; and in the diſtribution which they make of the companies, they place ſome of themſelves as belonging to other companies than to Capt. *Stewart's* or Capt. *Campbell's*. It is very true, that after the officers were appointed, and the recruiting had begun, the reſpondent claſſed the ſubalterns, and appointed them to different companies, as he found moſt convenient for the ſervice. This is the province of every commanding officer; no ſubaltern is, by his commiſſion, appointed to this or that particular company of a regiment. The reſpondent's officers were ſcattered in recruiting parties all over *Scotland*; he therefore ordered the ſubalterns neareſt the head-quarters of any Captain to be *pro tempore* under his command; and when the whole were aſſembled together, care was taken to join thoſe who had ſerved before with thoſe who had not, as far as was poſſible.

As to the particulars of the ſcheme, the purſuers have not been very accurately informed of the ſums drawn by each officer; though, even from the ſcheme as it ſtands, it is plain, that the aſſertion formerly made by them of the reſpondent's having pocketed no leſs than *L.* 2000 of this regimental fund was highly injurious; for it is plain, that the payments admitted in the ſcheme do, to a trifle, exhauſt the whole fund. It happens unfortunately that Mr *Goldfrap*, formerly agent to the regiment, has been in *America* ever ſince this proceſs commenced, and the reſpondent has not the materials from which an exact ſtate of the regimental accounts can be drawn out: but, ſo

far as he can recollect, he thinks the diviſion of the levy-money among the Captains and ſubalterns of the four companies was as follows: Capt. *Boyd*, Capt. *Forbes*, Capt. *Sutherland*, and Major *M'Leon* himſelf drew *L.* 5, 10 *s.* each of them, *L.* 5, 10 *s. per* man for the *quotas* they were obliged to raiſe, being forty-four men each; the Lieutenants and Enſigns drew at the rate of *L.* 3, 3 *s. per* man for their ſeveral *quotas*, with this exception, that the reſpondent having a power, as well as all the other Commandants of theſe new levies, to diſpoſe of three or four ſubalterns commiſſions in any way he thought proper, did accordingly diſpoſe of a Lieutenancy to his nephew *John M'Quhary*, and another to *Archibald Lamont*, unde the condition of their raiſing ſo many men, for which reaſon they were intitled to no levy-money. The reſpondent did underſtand at the time, that the whole of the regimental fund was exhauſted by theſe payments; and he is ſtill ſatisfied that this was the caſe, though it is ſufficient for him to ſay, that whether it was or not, he received nothing more than his own ſhare, and that if the purſuers have any claim at all, it muſt be either againſt the agent of the regiment, or againſt the whole regiment in general.

The above is a full and true ſtate of the facts giving riſe to this proceſs; and the reſpondent ſhall only ſubmit a very few obſervations, from which it will appear, not only that the proceſs is moſt unjuſt and groundleſs in itſelf, but that it neceſſarily depends upon a diſcuſſion of various points, which cannot, with any propriety, be judged of by your Lordſhips.

And, *1mo*, From what has been ſaid, it is plain, that the claim made for the purſuers, proceeds on the following moſt erroneous ſuppoſitions: *1ſt*, That by the letter of inſtructions from the War office, there was a contract between his Majeſty and the officers, whereby an actual grant or transfer was made of this money, in favour of the whole officers of the battalion. *2dly*, That the recruiting orders were iſſued by the reſpondent's ſole authority: and, *3dly*, That Major *M'Lean* received the whole of this money, and applied it to his uſe. All and each of theſe ſuppoſitions have been fully obviated; and particularly it has been ſhown, that no transfer of this money was made, nor any *jus quæſitum* given to the officers. It was a bounty flowing from the King, which remained entirely at his diſpoſal, and a great part of which was accordingly taken away from the regiment, and applied to other uſes; ſo that if theſe purſuers think they have any title in equity to a ſhare of it, they ought to apply to the

King,

King, or to his Secretary at war, who have the beſt right to explain their own orders. Nor does it occur, how any court of law can interpoſe in the diſtribution of this money, when it is plain, that even if your Lordſhips were to give a judgment in favour of the purſuers, it would ſtill be in the power of the King to render that judgment ineffectual, by ordering that no part of the money ſhould be paid to them.

2*do*, It would, with ſubmiſſion, be the leſs proper for your Lordſhips to interfere in this matter, when it is an undoubted fact, which the reſpondent will prove if deſired, that the queſtion has been two ſeveral times decided againſt the purſuers, at their own application, by the Secretary at war, the proper officer, who, by the conſtant cuſtom of the army, has been in the uſe of determining all differences of that kind ariſing among officers.

3*tio*, As your Lordſhips muſt be ſatisfied, from a peruſal of the original letter of inſtructions, compared with the recruiting inſtructions likewiſe iſſued from the War-office, that in raiſing theſe regiments things were not conducted in the moſt diſtinct and accurate manner, and that a great deal muſt neceſſarily have been left to the verbal explanations of the Secretary at war, and to the rules and cuſtoms of the army; ſo if you once open a door, by permitting this queſtion to be tried before you, the conſequence is plain, that hundreds of proceſſes of the ſame kind, will be brought by the inferior officers of the ſeveral battalions, for redreſs of pretended wrongs; and before your Lordſhips can poſſibly form a judgment in ſuch queſtions, you muſt deviſe and eſtabliſh a ſet of accurate rules, by which the twenty regiments *ought* to have been raiſed. This will be a very difficult taſk, as hitherto every doubt in matters of this kind has been in uſe to be cleared up by the Secretary at war: and the reſpondent is much afraid, that even an attempt to aſcertain theſe rules, would give riſe to endleſs diſputes never before heard of in any civil court, and for deciſion of which, not one regulation or principle of law is to be found.

4*to*, If it were poſſible that this action could go on before your Lordſhips, it certainly could never proceed againſt the reſpondent alone, without calling into the proceſs the other officers who received their ſhares of this levy-money, the agent of the regiment who paid it out, and even the Secretary at war, and officers of ſtate, who diſpoſed of a part of the fund, to the prejudice of the regiment.—All theſe different parties are equally intereſted in the ſuit with the reſpondent.—This he has pleaded from the beginning, and does ſtill plead: and therefore,

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ſuppoſing your Lordſhips were to ſuſtain the action as competent, he can have no doubt that you would ſiſt proceſs till all parties having intereſt were called.

*5to*, With regard to the ſums paid by the purſuers for deficients, or for non-effective men, it is plain from the facts as above ſtated, that this part of the claim cannot have the leaſt ſhadow of foundation.—They were appriſed by the recruiting inſtructions iſſued at the War-office, that this was to be demanded of them; and without ſuch a regulation the regiment could not have been raiſed.—Col. *Graeme* obliged his officers to account for no leſs than fifteen guineas, for every deficient, and took them bound to do ſo on ſtamped paper, according to the form annexed. This perhaps was a little unequal, becauſe the ſum allowed by the public for ſupernumerary men was only ten guineas; yet the reſpondent never heard, that any of his officers thought themſelves intitled to bring that matter to an explanation before a court of law: and far leſs does the preſent caſe afford any ſuch pretence, as the officers were put on a moſt equal and proper footing with regard to deficients and ſupernumeraries, being obliged to pay ten guineas for the one, and intitled to receive ten guineas for the other.

*Laſtly*, The claim of the ſubalterns is inept and inconſiſtent with itſelf; for if they have any claim at all, it cannot be for a ſhare of the levy-money, which, in proportion to what the others received, would only amount to *L.*3, 3*s. per* man, but to total indemnification of whatever expence their men may have coſt them; as the footing on which their plea is expreſsly founded, is, *that they were to have no buſineſs with raiſing the regiment*, which ought to have been done at the expence of the Captains alone. Beſides, neither the Secretary at war, Col. *Graeme*, or any other officer in this ſervice, ever underſtood their inſtructions in that ſenſe.

*In reſpect whereof*, &c.

ILAY CAMPBELL.

# RECRUITING INSTRUCTIONS for Colonel GRÆME's Regiment.

THE terms upon which this regiment is to be raiſed, are, That the officers ſhall be at the expence of levy-money, and only receive ſubſiſtence for their men from the dates of their atteſtations. And even this ſubſiſtence will not be iſſued till after the regiment ſhall be reviewed, and certified. As an aid, ſuch of the officers as are now in the army are to have leave to ſell their preſent commiſſions.

The Captains are immediately to call a meeting of their ſubalterns, and to ſettle amongſt themſelves the *quota* of the company which each officer is to raiſe, and ſecurity to be given by each officer for raiſing his proportion. The liberty of drawing is to be confined to the Captains, and each Captain is to ſupply his own ſubalterns with bills from time to time, after the money formerly drawn ſhall have been expended in the ſervice. The officers are to pay at the rate of *L.* 10, 10 *s.* for each man deficient of their *quota*, and they are to ſtand all hazards till their men paſs review, and be certified.

Beating orders, articles of war, and atteſtations, may be had of *George Roſs*, Eſq; at his houſe in *Conduit*-ſtreet, or of *Robert Gardiner*, Eſq; in *Canongate* of *Edinburgh*.

There is no reſtriction as to ſize, ſo as all the men are not deformed, be free of diſeaſes, and fit for ſervice; and to prevent any impoſitions, the recruiting-officers muſt take care to have the men examined by a ſurgeon, before they pay the bounty-money. They are likewiſe to take care that all the men, non-commiſſioned officers as well as private, be regularly atteſted in terms of the mutiny-act, and that the atteſtations be preſerved.

The eſtabliſhment of each company is a Captain, two Lieutenants, an Enſign, four ſerjeants, four corporals, two drummers, and a hundred private men; of which latter, four are allowed to be non-effectives, to defray the contingent expences of the company, ſo that ninety-ſix private are only to be raiſed.

The recruiting officers are to make weekly returns to Col. *Græme* at *Edinburgh*. (Signed) DAV. GRÆME.

## *Form of the Bond taken by Col.* GRÆME *from his Subalterns.*

BE it known to all men by these presents, I *A. B.* Whereas Col. *David Græme*, commanding the Queen's own regiment of Highlanders, now levying in *North Britain*, has nominated me to be a Lieutenant in the said regiment, and to receive a commission as such, on the performance of the conditions stipulated by agreement between him and me, as mentioned in the bond and obligation underwritten: Therefore, Know ye me, and with me *C. D.* as cautioner, hereby with and for me, to be bound and obliged, as by these presents we bind and oblige ourselves, jointly and severally, to raise and inlist on the proper charges and expences of me, the said *A. B.* twenty-five able-bodied men, fit for carrying arms, and serving as soldiers in the said regiment, to be presented for being reviewed and examined, in order to be approved of at any place that shall be ordered in *North Britain*, and that betwixt and the 15th day of *March* next. And in case, at the said review, or examination of the men to be levied, the whole or any number of them should be disapproved of as unfit for the said intended service, or if the number approved shall fall short of the said *quota* of twenty-five men; in that event, we bind and oblige us, our heirs, executors and successors, to pay to the said Col. *David Græme*, or to the officer commanding the said regiment for the time being, or to any having their order, the sum of *fifteen pounds*, *fifteen shillings* for each man so disapproved of, and wanting to compleat the said quota of men fit for service, within the space of ten days after the said 15th of March next, or to forfeit every claim or pretension to the said commission. And, moreover, the number of men I the said *A. B.* shall have inlisted, shall belong, and be delivered over to the said regiment, on my receiving from them the *four pound Sterling* allowed of levy-money by the recruiting instructions for each man levied for the said regiment, and approved of, and the subsistence of these men, from the dates of their attestations, allowance and deduction being made for all sums received to account. And I the said *A. B.* to bear all risques and loss by desertion, and otherwise: and all these conditions I the said *C. D.* as surety for me bind and oblige us and our foresaids to fulfill and perform in every part to the said Col. *David Græme*, under the penalty of thirty pounds *Sterling*, over and above performance. Consenting, *&c. &c.*

*N.* One of the original bonds is produced in process.